

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HARVEY AND KATHRYN WACHSMAN	:	DETERMINATION
for Redetermination of Deficiencies or for	:	DTA NOS. 806930
Refund of Personal Income Tax under Article 22	:	AND 806931
of the Tax Law for the Year 1983.	:	

Petitioners, Harvey and Kathryn Wachsman, 55 Mill River Road, Upper Brookville, New York 11771, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1983.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 20, 1991 at 1:15 P.M., with all briefs to be submitted by June 25, 1991. Petitioners appeared by Greenfield, Eisenberg, Stein & Senior (Laurence Keiser, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUES

I. Whether petitioner Kathryn Wachsman timely filed a petition with the former Tax Appeals Bureau of the former State Tax Commission seeking administrative review of a personal income tax deficiency asserted, by the Division of Taxation, to be due from petitioner for the year at issue.

II. Whether the Division of Taxation properly determined that petitioners were taxable as residents pursuant to Tax Law former § 605(a).

III. If not, whether petitioners properly allocated income derived from New York sources pursuant to the provisions of Tax Law former § 632 and 20 NYCRR 131.18.

FINDINGS OF FACT

On April 7, 1986, the Division of Taxation issued a Statement of Audit Changes to

Harvey and Kathryn Wachsman ("petitioners") which, for the year 1983, asserted additional personal income tax due from Harvey Wachsman in the amount of \$23,722.00 and additional personal income tax due from Kathryn Wachsman in the amount of \$2,432.00, plus interest of \$5,650.11 due on the combined deficiencies. The Statement of Audit Changes advised that:

"[s]ince you have not replied to either of our letters dated July 10, 1985 and October 10, 1985, we have recomputed your tax liability as a full year resident."

On July 14, 1986, the Division issued a Notice of Deficiency to petitioner Harvey Wachsman asserting a personal income tax deficiency of \$23,722.00, plus interest, for a total amount due of \$29,465.03 for the year 1983. On the same date, a Notice of Deficiency was issued to petitioner Kathryn Wachsman in the amount of \$2,432.00, plus interest, for a total amount due of \$3,020.78 for the year 1983. To substantiate that the notices of deficiency were, in fact, mailed on July 14, 1986, the Division produced a certified mail record and an affidavit from Stanley K. DeVoe, Principal Clerk in the Manual Assessments Unit of the New York State Department of Taxation and Finance.

In order to be timely filed (within the 90-day period prescribed by Tax Law § 681[b]), petitions seeking administrative review of the aforesaid notices of deficiency issued July 14, 1986 had to have been filed on or before October 12, 1986. In 1986, October 12 was a Sunday and October 13 was the Federal and State observance of Columbus Day. Therefore, a timely petition had to have been filed on or before October 14, 1986.

The petition of Harvey Wachsman was received by the former Tax Appeals Bureau on October 14, 1986. The mailing envelope contained no United States postmark, but had a machine-metered postmark of October 11, 1986 from Merrick, New York. The Division of Taxation initially contended that this petition was untimely. However, in apparent reliance on the regulations of the Tax Appeals Tribunal (20 NYCRR 3000.16[b]) rather than on the fact that October 12, 1986 was a Sunday and October 13, 1986 was a holiday, the Division conceded that the petition of Harvey Wachsman was timely.

The petition of Kathryn Wachsman was received by the former Tax Appeals Bureau on October 16, 1986. As was the case with Harvey Wachsman's petition, the mailing envelope

contained a machine-metered postmark of October 11, 1986 from Merrick, New York. However, the envelope also contained a United States postmark of October 14, 1986 from Poughkeepsie, New York.

Both petitions were apparently mailed by petitioners' then-accountants, Peat, Marwick, Mitchell & Co., who had offices in Jericho, New York. James F. Hanley of this accounting firm (who was formerly the accountant for the law firm of Pegalis & Wachsman, P.C. until discharged in 1988) testified as to his firm's mailing procedures. He stated that the envelopes containing the petitions bore consecutive certified mail numbers (which was the case), bore identical metered postmark dates and, based upon his knowledge of office mailing procedures, were both mailed on Saturday, October 11, 1986 in either Jericho or Merrick (Long Island), New York. He could not explain why Kathryn Wachman's petition was postmarked in Poughkeepsie except to say that the petition could not have been mailed from that location.

For the year 1983, petitioners filed Form IT-203, Nonresident Income Tax Return, under the filing status "married filing separately on one return". The return was prepared and signed by James F. Hanley of Peat, Marwick, Mitchell & Co. Petitioners' address, as set forth on the return, was Great Quarter Road, Sandy Hook, Connecticut. Exclusive of New York additions and subtractions and Federal adjustments, petitioners' total income (Federal amount) consisted of interest income of \$994.00, losses from rental property of \$9,493.00 and wages of \$360,833.00. Attached to the return were wage and tax statements (Forms W-2) from Pegalis and Wachsman of Great Neck, New York which indicated that, for 1983, wages of \$320,833.36 were paid to Harvey Wachsman and wages of \$39,999.96 were paid to Kathryn Wachsman. Both W-2 forms indicated that the address of Harvey and Kathryn Wachsman was 269-32V Grand Central Parkway, Floral Park, New York.

On Schedule A (Allocation of Wage and Salary Income to New York State), petitioners indicated that total days worked in 1983 were 303 (excluded were 52 Saturdays and Sundays and 10 vacation days), total days worked outside New York were 183 and days worked in New York were 120. The resulting allocation was, therefore, determined to be \$142,904.00 (120/303

x \$360,833.00).

On their petitions challenging the Division of Taxation's determination that they were taxable as New York residents, each petitioner attached an identical schedule which set forth his or her location for each day of 1983. Pursuant to these summaries, petitioners admitted that each had worked 140 days in New York. As a result thereof, petitioner Harvey Wachsman concedes that an additional \$2,476.00 in personal income tax is due to New York State while petitioner Kathryn Wachsman concedes that an additional \$243.00 in personal income tax is due to the State.

At the hearing, petitioners' former accountant (James F. Hanley of Peat, Marwick, Mitchell & Co.) stated that his firm had been discharged by petitioners in the spring of 1988. As a result, petitioners' files were put in storage (Time Storage of Hempstead). In December 1988 or January 1989, a water pipe burst at the storage facility and many of the records placed there were damaged. Time Storage was forced to move everything to a separate warehouse. Because of limited access to the files, Mr. Hanley's firm hired a new storage firm (Record Keepers in Farmingdale). Upon making a search for petitioners' records, Mr. Hanley was unable to locate them at the Record Keepers' facility. He was unsure whether the records were lost or destroyed.

Mr. Hanley also testified that, in preparing the schedules setting forth the days in and days out of New York (attached to each petition), he dealt with a secretary at the firm of Pegalis and Wachsman who prepared the schedules based upon petitioners' daily calendar. Mr. Hanley stated that the allocation of days in and out of New York, as set forth on the tax returns, was computed based upon discussions with petitioners. He further stated that the daily diary for 1983 would not have been placed with his firm's files.

Petitioner Harvey Wachsman is a physician and an attorney. He is licensed to practice medicine in eight states and licensed to practice law in six states and the District of Columbia. He is a full professor of law at Brooklyn Law School and the St. Johns University School of Law and is a professor (College of Medicine and Neurology) at the State University of New

York at Stony Brook.

After graduating from medical school, he did his internship in New York and then was a resident and chief resident in neurosurgery at Emory University in Atlanta, Georgia. Thereafter, he lived in Florida and later moved "out west" for a short time. In 1971, he moved to Connecticut and practiced neurosurgery there. In 1973, he rented a house on Great Quarter Road in Sandy Hook, Connecticut and, in 1975, he purchased this house. In 1976, he was married, in Connecticut, to petitioner Kathryn Wachsman and both petitioners resided in this home until it was sold in the latter part of 1986.

Petitioner Harvey Wachsman graduated from law school in 1976. In May 1976, Kathryn Wachsman (who was already an attorney and who had previously practiced in Kansas) opened a law office in Newtown, Connecticut. Harvey Wachsman worked as an assistant for his wife until his admission to the bar in October 1976. In 1978 or 1979, petitioners moved their law practice to their house on Great Quarter Road in Sandy Hook, Connecticut.

In 1975, a friend introduced Harvey Wachsman to Steven Pegalis. In March 1977, he joined Steven Pegalis in the practice of law in Great Neck, New York and became a partner in the firm of Pegalis and Wachsman. Because the Great Neck offices were so small, Harvey Wachsman often worked for the firm at his home or office in Connecticut. Because of the commute (approximately 1 hour and 45 minutes each way) from Great Neck to his home, he rented an apartment in Floral Park (Queens), New York beginning in 1979 (it is unclear for how long the apartment was rented, although it was rented through 1983). The apartment was within about a 15-minute drive from the Great Neck office. The apartment had 2 bedrooms and 1½ bathrooms. Initially, it was sparsely furnished (a card table, a lamp from a motel owned by a friend and a box-spring and mattress). Eventually, more elaborate furnishings were added. Harvey Wachsman stated that he used the apartment when he was too tired to travel back to Connecticut or when he had to work late in New York. Harvey Wachsman testified that his only explanation for the unavailability of the daily calendar for 1983 was that, due to extensive growth and construction on behalf of Pegalis and Wachsman, records were sent to storage and

the daily calendar for 1983 could not be located.

While residing in Connecticut, petitioner Harvey Wachsman was registered to vote in Connecticut and possessed a Connecticut driver's license, medical license, legal license and gun permit. In 1983, he belonged to the Fairfield County (Connecticut) Medical Society and the American Medical Association through the Connecticut State Medical Society. He was active in various organizations in Connecticut such as town committees, police commissions, etc. In the State of New York, his only affiliations were with the New York State and Nassau County Bar Associations and the New York State Trial Lawyers. For the year at issue, most of petitioners' bank statements, charge account bills and investments were addressed to their Great Quarter Road home.

In 1986, petitioners moved to the State of New York, purchasing a home at 55 Mill River Road, Upper Brookville, New York. At that time, Harvey Wachsman registered to vote in New York and changed all of his licenses to reflect his change in residence. Since their move to New York in 1986, petitioners have maintained a Connecticut law office, although they work with another attorney there, because Federal courts in Connecticut do not permit attorneys to practice without an open Connecticut office.

Prior to her marriage to Harvey Wachsman in 1976, petitioner Kathryn Wachsman resided in Johnson County, Kansas where she practiced law. She is licensed to practice law in Kansas, Connecticut, New York, Florida and Washington, D.C.

From 1976 through 1986, she was registered to vote in Connecticut, possessed a Connecticut driver's license and was a member of the Newtown (Connecticut) Bar Association. For all years from the date of her marriage until 1986, she resided with her husband at Great Quarter Road, Sandy Hook, Connecticut. She testified at the hearing that, whenever her husband traveled, she accompanied him. When Harvey Wachsman stayed in the New York apartment, she (and their children) usually did as well. She stated that, in 1983, she and her husband saw clients in their home and had active cases in Connecticut courts.

The law firm of Pegalis and Wachsman was initially a partnership and, at some time

prior to 1983, it became a professional corporation. Kathryn Wachsman joined the firm of Pegalis and Wachsman in 1978 and was associated with the firm during the year at issue (it is unclear whether or not she was a partner). The law firm of Wachsman and Wachsman was, at all times, a partnership. During 1983, petitioners (Wachsman and Wachsman) saw clients in their home at Great Quarter Road (Connecticut), utilizing a portion of their living room for this purpose. They (Wachsman and Wachsman) also had a Florida office located in Palm Beach (see, Petitioners' Exhibit "1"). Steven Pegalis was "of counsel" to the firm of Wachsman and Wachsman, but did not hold a partnership interest therein.

Kathryn Wachsman testified that time spent in Connecticut (work days) reflected work performed on Connecticut and other non-New York cases. Work performed on New York cases was done in New York. The work of Wachsman and Wachsman was performed in Connecticut; work for Pegalis and Wachsman was done in New York. She stated that the daily diary (from which the days-in and days-out allocation and schedules were prepared) was kept by Harvey Wachsman's secretary at Pegalis and Wachsman.

Petitioners' representatives, in their memorandum of law submitted in this matter, set forth proposed findings of fact as follows:

(a) Six proposed findings of fact relating to "I. Procedural Issue". Of these six, all but No. 4 were included within Findings of Fact "1" through "9" above. No. 4, while alleged in the testimony of James F. Hanley, has not been proven and is, therefore, not supported by the facts herein;

(b) With respect to "II. Residence issue", 17 proposed findings of fact were submitted on the domicile issue. All have been incorporated into Findings of Fact "1" through "9" except that portion of No. 16 which categorizes the use of the apartment as "infrequent", since this statement is conclusory in nature and is otherwise unsupported by the record. Six additional proposed findings of fact were submitted by petitioners on the issue of whether or not more than 183 days were spent in New York. Nos. 1, 2, 3, 5 and 6 are included within Findings of Fact "1" through "9"; No. 4 is conclusory in nature and is not,

therefore, included therein.

CONCLUSIONS OF LAW

A. Tax Law § 681(b) provides that, after 90 days from the mailing of a Notice of Deficiency, such notice shall be an assessment of the amount of tax specified therein, unless the taxpayer has within the 90-day period filed a petition as provided in Tax Law § 689.

Since the notices of deficiency were issued and the petitions were filed with the former State Tax Commission prior to the creation of the Division of Tax Appeals, reference will, therefore, be made to the decisions of the former State Tax Commission with regard to the issue of timely filed petitions.

20 NYCRR former 601.3(c) provided as follows:

"Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, N.Y. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

In Matter of Garofalo (State Tax Commn., September 28, 1983) and Matter of Mancuso (State Tax Commn., September 28, 1983) the State Tax Commission held the following:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period."

B. By virtue of the provisions of Chapter 282 of the Laws of 1986, the Division of Tax Appeals was created and transitional provisions (applicable to pending petitions filed with the former State Tax Commission) were included therein which granted to the Division of Tax Appeals jurisdiction over such matters. Section 32 of chapter 282 of the Laws of 1986 provides, in pertinent part, as follows:

"This act shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent that this act can be made applicable...." (Emphasis added.)

Therefore, if it is determined that petitioner Kathryn Wachsman timely filed a petition with the

former State Tax Commission, then the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

C. General Construction Law § 25-a(1) provides, in pertinent part, as follows:

"When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day...."

As indicated in Finding of Fact "3", supra, petitioner Kathryn Wachsmann's petition, while not received until October 16, 1986, had affixed to the envelope containing such petition a United States postmark of October 14, 1986. While this date is two days after the expiration of the 90-day period for the filing of the petition, such petition is nonetheless timely since October 12, 1986 (the last day for timely filing) was a Sunday and October 13, 1986 was a holiday (Columbus Day). Therefore, the petition of Kathryn Wachsmann was timely filed with the former State Tax Commission and the Division of Tax Appeals has jurisdiction of the subject matter contained therein.

D. Tax Law former § 605(a), in effect for the year at issue, defined a resident individual as one:

"(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or...

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

While the Tax Law contains no definition of "domicile", the regulations (20 NYCRR 102.2[d]) of the Division of Taxation provide, in pertinent part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are

contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

The evidence produced herein clearly indicates that, for the year 1983, petitioners were domiciliaries of Connecticut. For many years prior to the year at issue, petitioners maintained a permanent place of abode in Connecticut, were registered to vote there, held licenses from that state, etc. Therefore, what must next be examined is whether petitioners, despite being domiciled in Connecticut, could, nevertheless, be taxed as New York residents on the basis that they maintained a permanent place of abode in and spent, in the aggregate, more than 183 days in the State of New York.

E. 20 NYCRR 102.2(e) defines "permanent place of abode" as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

Since the rental of the apartment in Floral Park, New York (from 1979 through and after the year at issue) was not for a fixed and limited period, it must, therefore, be determined that such apartment constituted a permanent place of abode in New York.

With respect to the issue of whether or not petitioners spent, in the aggregate, more than 183 days in the State during 1983, 20 NYCRR 102.2(c) provides, in part, as follows:

"Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State."

It is undisputed that petitioners do not have daily records of their whereabouts during 1983.

They do maintain, however, that such records existed in the form of a daily diary kept by

Harvey Wachsman's secretary at Pegalis and Wachsman. Two possible explanations for the present unavailability of this diary were presented at the hearing.

Petitioners' former accountant, Mr. Hanley, testified that the days-in- and-out allocation on the tax return was prepared through discussions with petitioners. As to the summary schedules attached to the petitions, Mr. Hanley is not sure whether or not he saw the diary, but he admitted that it would not have been placed within his firm's files (see, Finding of Fact "5"). Therefore, it must be determined that the water damage to the Time Storage warehouse and the subsequent transfer of petitioners' records to Record Keepers was not the cause for petitioners' inability to produce substantiation for their days in and out of New York for 1983.

Petitioner Harvey Wachsman testified (see, Finding of Fact "6") that his only possible explanation for the inability to produce daily records for 1983 was that, due to the extensive growth and resulting construction by Pegalis and Wachsman, his records were sent to storage and could not, therefore, be located.

In their brief, petitioners, citing Murray v. Commissioner (41 TCM 337) and Canfield v. Commissioner (41 TCM 461), contend that they should be allowed to introduce reconstructed records where the nonexistence of the original records is beyond their control. In these cases, both of which involved the substantiation of claimed business expenses, the court, in rendering its opinions, referred to Treas Reg § 1.274-5(c)(5) which provides as follows:

"Loss of records due to circumstances beyond control of taxpayer. Where the taxpayer establishes that the failure to produce adequate records is due to the loss of such records through circumstances beyond the taxpayer's control, such as destruction by fire, flood, earthquake, or other casualty, the taxpayer shall have a right to substantiate a deduction by reasonable reconstruction of his expenditures."

In Murray, supra, the court held that the petitioner's lack of records was due to circumstances beyond his control (he was evicted from his apartment and found some of his possessions on the street; the rest, including his records, were lost or stolen during the abrupt eviction). The court distinguished such facts from Schafer v. Commissioner (35 TCM 1681), cited in respondent's trial memorandum, stating:

"There, the taxpayer claimed relief from the substantiation requirements of section 274 by showing that he lost his records during one of several moves. We there held

that such circumstances do not constitute a casualty-like occurrence which will bring the taxpayer within the ameliorative boundaries of section 1.274-5(c)(5), Income Tax Regs."

As previously noted, the only explanation offered for the failure to produce records was that they were sent to storage and cannot now be located. These facts are analogous to those in Schafer, supra, and are also not a casualty-like occurrence which was beyond petitioners' control. It should also be noted herein that the summaries of days in and out of New York, attached to petitioners' petitions (Exhibits "D" and "E"), indicate that 111 workdays were spent by each petitioner in Connecticut. The summaries also indicate that each petitioner worked 140 days in New York. Petitioners stated that, during the year at issue, they saw clients and had active cases in Connecticut courts. Petitioner Kathryn Wachsman testified that the work performed in Connecticut was for clients of Wachsman and Wachsman and that the work performed in New York was primarily for the firm of Pegalis and Wachsman. Yet, neither petitioner reported any income from Wachsman and Wachsman, as evidenced by the Federal amount set forth on their 1983 New York return which indicates total wages and salaries of \$360,833.00 (no business or partnership income was included on the return). The only wage and tax statements attached thereto were from Pegalis and Wachsman (\$320,833.36 paid to Harvey Wachsman and \$39,999.96 paid to Kathryn Wachsman). Accordingly, the summaries cannot be found to be credible representations of days in and out of New York for the year 1983. Petitioners have failed, therefore, to sustain their burden of proving that they did not spend, in the aggregate, more than 183 days in the State of New York during 1983 and, since they maintained a permanent place of abode in the State during the year, they were properly subject to tax as residents pursuant to Tax Law former § 605(a).

F. By virtue of Conclusion of Law "E", supra, Issue III is rendered moot.

G. The petitions of Harvey and Kathryn Wachsman are denied and the notices of deficiency issued to each petitioner on July 14, 1986 are hereby sustained in their entirety.

DATED: Troy, New York
4/16/92

ADMINISTRATIVE LAW JUDGE